

Protest of)	
)	Date: September 15, 1989
NEIL GARDIS & ASSOCIATES, INC.)	
)	
Solicitation No. 059984-89-A-0016)	P.S. Protest No. 89-44

DECISION

Neil Gardis & Associates, Inc. (Gardis), timely protests the award of any contract for repair to and alteration of the San Francisco Bulk Mail Center (BMC), under Solicitation No. 059984-89-A-0016, on the grounds that the contracting officer "without explanation or reason" requested offerors to provide best and final offers.

Solicitation No. 059984-89-A-0016, issued February 3, 1989, by the San Bruno Facilities Service Center, Western Region (FSC), sought proposals for repair to and alteration of the BMC. Proposals were to be submitted by March 24. On March 27, while performing an analysis of the proposals, the project manager discovered an ambiguity in the otherwise most favorable offer. Determining that the uncertainty could not be resolved by "clarification," he held "discussions" with the low offeror pursuant to Procurement Manual (PM) 4.1.5 g. 1.^{1/} The contracting officer sent to all offerors in the competitive range, including Gardis, a letter dated May 1 requesting them to submit their best and final offers by May 5.

In response, Gardis submitted two letters dated May 5 to the contracting officer. One stated its willingness to submit "a more attractive best and final offer" only if it was

^{1/}PM 4.1.5 a. 2. and 3. define "clarification" as "communication with an offeror for the sole purpose of eliminating minor irregularities, informalities, or apparent clerical mistakes in a proposal," and "discussion" as "any oral or written communication between the Postal Service and an offeror (other than communications conducted for the purpose of clarification) that is initiated by the Postal Service and (a) involves information essential for determining the acceptability of a proposal or (b) provides the offeror an opportunity to revise its proposal."

PM 4.1.5 g. 1. provides, in part, that "[w]henver appropriate, written or oral discussions may be held with offerors to resolve uncertainties in their proposals, to give them an opportunity to correct deficiencies, and to give them an opportunity to revise their proposals. If discussions are held with one offeror, discussions must be held with all offerors in the competitive range."

provided price information from the other proposals, and objected to the procedure by which the best and final offers were requested, believing it to allow bid shopping. The second letter stated Gardis' intention to protest any award on the solicitation on a basis which it said would be forthcoming within ten days.

The contracting officer did not respond to Gardis' request for price information from the other proposals, and Gardis did not submit a best and final offer. The contracting officer advised Gardis by letter dated May 10, that its May 5 letter was not a proper protest because it failed to set forth the basis of the protest. On June 20, a contract was awarded to Meddco Metal.^{1/}

On May 16, the contracting officer received Gardis' letter protesting any award, alleging that the contracting officer had failed to conduct negotiations with offerors that submitted proposals, that the decision not to hold negotiations conflicted with postal regulations and that the contracting officer revealed to Gardis that the request for best and final offers was an attempt to obtain a more favorable offer. On June 2, the contracting officer denied the protest as obviously without merit, asserting that the procedure followed was neither irregular nor improper. Thereafter, by letter dated June 13, Gardis sought this office's further review of its concerns.

Gardis objects to the contracting officer's failure to provide the offerors with an explanation or reason for the call for best and final offers. Gardis views the request as "highly irregular" and an attempt to obtain a more favorable offer. Gardis states that it contacted the contracting officer and was advised "that the prices contained in the offers received were not within the Postal Service budget." Gardis requests that we advise the contracting officer to disregard all best and final offers.^{1/}

In his report to this office, the contracting officer restates his understanding that because it was necessary to conduct discussions with one offeror during the evaluation of the proposals that it was necessary to conduct discussions with the other offerors, and that the request for best and final offers was issued for that reason. The contracting officer asserts that the steps taken to address the uncertainty in the most favorable initial proposal were in compliance with the PM. In response to this office's telephonic request for clarification of his account of the facts, the contracting officer denied Gardis' allegation that Gardis was advised that the prices were over the budget.

^{2/}Using the procedure contemplated by PM 11.5.1 o., by letter dated May 11, the contracting officer advised Meddco of his intent to award the contract to it upon receipt of a copy of the contract executed by the contractor along with the appropriate bonds. The other offerors were advised of the award by letters dated June 20.

^{3/}In comments received by this office September 13, Gardis makes it clear that it does not allege it is entitled to award of the contract, but rather that an offeror other than the awardee should have received the contract. By failing to allege its own entitlement to the contract, Gardis' standing in this matter is brought into question. See Safety Technology, Inc. and Con-Serv, Inc., P.S. Protest Nos. 85-85 and 85-86, December 31, 1985; Strapex Corporation, P.S. Protest No. 85-33, July 11, 1985; Malcolm A. Miller, Inc., P.S. Protest No. 87-87, August 25, 1987. Because of the resolution of this protest, however, we need not reach that issue.

The contracting officer advised that the budget for the BMC project was large enough to accommodate any of the prices in the initial proposals.

The protester's concerns appear to reflect an unfamiliarity with the process of awarding contracts by negotiation. As PM 4.1.5 g. 1. provides and the contracting officer notes, when discussions are held with one offeror, they must be held with all. When there are no particular matters to be the subject of discussion with a particular offeror, a request for that offeror's best and final offer satisfies the requirement for discussion. Beier And Gunderson; Executive Office Concepts, P.S. Protest No. 87-51, July 17, 1987; Input Output Computer Services, Inc., P.S. Protest No. 86-28, July 2, 1986; See also Information Management, Inc., Comp. Gen. Dec. B-212358, January 17, 1984, 84-1 CPD & 76.

The Postal Service's procurement regulations provide instructions concerning the conduct of discussions which are intended to ensure the integrity of the process. Those instructions provide that the discussions shall not include technical leveling, technical transfusion, or auction techniques. The precluded auction techniques include "[i]ndicating to an offeror a cost or price that it must meet to obtain further consideration" and "[f]urnishing information about other offerors' prices or advising an offeror of its price standing relative to another offeror. (However, it is permissible to inform an offeror that the Postal Service considers its cost or price too high or unrealistic.)" PM 4.1.5 g. 3(b)

In the instant case, there is a dispute as to whether the contracting officer engaged in precluded auction techniques. When there is a conflict between a statement of a protester and the contracting officer, this office has consistently accepted the contracting officer's statement in the absence of evidence sufficient to overcome the presumption of correctness which attaches to the contracting officer's action. Harpers Ferry Properties, Inc., P.S. Protest No. 76-67, November 8, 1976; Alta Construction Company, P.S. Protest No. 85-2, April 19, 1985; Edsal Machine Products, Inc., P.S. Protest No. 85-84, January 29, 1986; Cohlmia Airline, Inc., P.S. Protest No. 87-118, April 13, 1988. Gardis has failed to present information sufficient to overcome the presumption of correctness, and, accepting the contracting officer's denial of the prohibited conduct, we conclude the negotiations were not tainted by actions in violation of the PM.

The protest is denied.

[Norman Menegat for:]

William J. Jones
Associate General Counsel
Office of Contracts and Property Law

[checked against original JLS 5/24/93]